In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 312

UNITED STATES OF AMERICA, PETITIONER

v.

THE OHIO POWER COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY BRIEF ON MOTION OF THE UNITED STATES FOR LEAVE TO FILE A PETITION FOR REHEARING AND PETITION FOR REHEARING

I

The brief filed by the taxpayer in response to the motion of the United States for leave to file a petition for rehearing raises an important preliminary procedural question which, in addition to the substantive tax issues in this case, warrants review and resolution by the Court. This question relates to the jurisdiction and powers of this Court; and its definitive settlement in this case would afford guidance to the bar and avoid unnecessary future litigation.

The taxpayer asserts (pp. 2–13) that it would be contrary to this Court's Rule 58 (4) to grant the Government's motion for leave to file an untimely and successive petition for rehearing of the prior denial of certiorari. Pointing to 28 U. S. C. 452 and suggesting that this Court may have been deprived of any jurisdiction to grant petitions or motions which are filed out of time (see Wiener, *The Supreme Court's New Rules,* 68 Harv. L. Rev. 20, 85–86 (1954)), the taxpayer contends that, at the very least, Rule 58 (4), when read in conjunction with 28 U. S. C. 452 means that (p. 6) "this Court should no longer grant consecutive or out-of-time petitions for rehearing on the allegation of a belatedly developed conflict of decisions among the circuits."

As the taxpayer recognizes, prior to the adoption of the present Rules, this Court did not consider itself without power to grant motions for leave to file untimely petitions for rehearing and, in appropriate circumstances, particularly when justified by intervening events, such as the subsequent development of a conflict in decisions, such motions were allowed and certiorari granted despite a prior denial. Commentators have expressed doubt that the Court intended by Rule 58 (4) to deprive itself of discretionary authority to consider and grant such motions. See Stern and Gressman, *Supreme Court practice* (2nd Ed.,

II

The taxpayer asserts (pp. 15–22) that there is no conflict to be resolved by this Court, it being contended that the decision of the Second Circuit in *Commissioner* v. *National Lead Co.*, 230 F. 2d 161, is distinguishable since the necessity certificates for less than 100 percent which were issued in that case might have reflected an administrative determination that the entire facilities were not necessary to the national defense, while here the certificates were issued for less than 100 percent because the facilities possessed a post-war utility.

Actually, the certificates which were issued in both cases appear to be identical. And, in *National Lead,* both the Government and the taxpayer presented the case to the Court of Appeals as one where the certificates were issued for less than 100 percent of cost only because of the policy of the administrative agency to reflect post-war use. (Govt. Br. 5–6; Pet. Br. 2.) Neither side even suggested that there was any difference between that case and this one. Nor is there anything in the opinion of the Court of Appeals which intimates that it took a different view of the facts of the case than the parties had presented. And, significantly, the Court of Claims has recognized that the *National Lead* decision conflicts with its own decisions, including its decision in the present case.

Furthermore, the crux of the conflict lies in the fact that the Second Circuit refused to permit a collateral attack, in the tax proceeding, on the administrative decision in issuing partial certificates of necessity. The Court of Claims did precisely the contrary. Consequently, it would make little difference, so far as both courts are concerned, whether the administrative refusal to issue a 100 percent certificate was based on one ground rather than another. Under these circumstances, a conflict in decisions exists.

III

A question of jurisdiction has also been raised, the taxpayer contending (pp. 13–15) that the original petition for a writ of certiorari was untimely. The issue here involves a determination of when the final judgment of the Court of Claims was entered, so as to start the statutory period under 28 U. S. C. 2101 (c) within which a petition for a writ of certiorari may be filed.

On March 1, 1955, the Court of Claims promulgated its opinion in this case in which it granted the taxpayer's motion for summary judgment and denied the motion for summary judgment filed by the United States. The opinion stated that "Entry of judgment is suspended to await the filing by the parties of a stipulation showing the amount due." On March 30, 1955, the Court of Claims entered an order which recited that it had "rendered an opinion" on March 1, 1955, holding

that the taxpayer was entitled to recover "but suspended the entry of judgment" pending a stipulation of the parties showing the amount due. After reciting that such a stipulation had been filed, the order of March 30, 1955, provided "that judgment be and hereby is entered" for the taxpayer in the amounts stated.

The critical question here is not when the Court of Claims arrived at a judgment which in common parlance was final, but rather when did it *enter* that judgment, since the period for filing a petition for certiorari begins to run under 28 U. S. C. 2101 (c) only upon "entry" of the "judgment". If the rendition of the opinion and decision of the Court of Claims on March 1, 1955, is considered the "entry" of "judgment", then the petition in this case was untimely. However, if no judgment was entered by the Court of Claims until March 30, 1955, then the extension was granted within the 90-day period and the petition was timely.

While Rule 38 (c) of the Court of Claims provides that "where the court determines that a party is entitled to recover and the amount of recovery is reserved for further proceedings, the judgment on the question of the right to recover shall be final", its rules explicitly show that the rendition of the judgment and its formal entry do not always coincide. Rule 52 states that the clerk shall "enter judgment" when "the Court directs the entry of judgment" and that the "notation of

a judgment on the docket * * * constitutes the entry of judgment."

Here the Court of Claims having specifically provided in its opinion that "the entry of judgment is suspended" and having thereafter entered an order directing that "judgment be entered," it would seem to be fairly obvious that the court cannot be deemed "to have entered" the judgment by the very order in which it stated that such entry is being "suspended".[1] Under such a view, the petition here was timely. See *Commissioner* v. *Estate of Bedford*, 325 U. S. 283, 284–288. The question concerning the time within which to file a petition from a judgment of the Court of Claims of the kind entered in this case was also raised earlier this term by the respondent in *United States* v. *Tanner* (No. 280, October Term, 1955), certiorari denied, 350 U. S. 842, and a discussion of the point is contained in the memorandum filed by the United States in response to the brief in opposition.

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General.

MAY 1956.

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[1] Cf. *Caltex* v. *United States*, 100 F. Supp. 970, 980, reversed, 344 U. S. 149, where the Court of Claims did not suspend the entry of judgment.

U. S. GOVERNMENT PRINTING OFFICE: 1956